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Contents / Sommaire / Inhalt

Articles / Aufsätze

Reviews /Comptes rendus / Besprechungen

Instructions to Authors

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MARK MCMILLAN, FAYE MCMILLAN & SOPHIE RIGNEY

How Indigenous Nation-Building Can Strengthen Indigenous Holistic Health Outcomes

Retelling the Right to Health

ABSTRACT The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) has declared that Indigenous peoples and populations inherently possess a right to health. Such a right does not merely exist with reference to physical health. The General Assembly of the United Nations when adopting the UNDRIP requires the meaning of "health" to be expansive and also be characterised as a collective right. This article will provide a particular framework for understanding the right to health for Indigenous peoples as a collective right, which exists in a symbiotic relationship with the rights to greater self-determination and governance.

KEYWORDS Indigenous health, self-determination, Indigenous nation building, Indigenous governance, UNDRIP

The passage of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP 2007) in 2007 has provided a particular framework for understanding the right to health for Indigenous peoples as a collective right, which exists in a symbiotic relationship with the rights to greater self-determination and governance. The UNDRIP provides a unique and timely opportunity for Indigenous peoples to articulate our demands that bring legal and cultural rights into the realm of epidemiology, and facilitate epidemiological approaches that have cultural legitimacy with Indigenous participants. Historically, many approaches have ignored the emphasis that Indigenous people place on the holistic concept of health that encompasses the social and emotional well-being of the individual, family and community (see ICESCR 1966: article 12). In this paper, we (Mark and Faye McMillan) speak as Wiradjuri nation builders and citizens, as well as academics from the disciplines of health and law (Sophie Rigney). We seek to interrogate the history of the UNDRIP, and specifically the Indigenous rights to health. Here, through conversation, we retell the history of the development of the right contained in the UNDRIP. This retelling is important, because it is a starting place for the leaders of Indigenous nations—in their nation-building processes—to restore the holistic understanding of health for our nations and their citizens. In this way, we argue, nations are able to use self-determination as a cultural determinant of health. We also demonstrate how health and governance are already being linked in tertiary education, to support Indigenous people to understand the interdependence of the health of nations and citizens. This article therefore offers both a conceptual understanding of the right to health and how it is linked to nation-building, and a demonstration of how this conceptual understanding is currently being invoked in epidemiological teaching approaches.

Our Places as Lawyers and Indigenous Health Care Educators between the Spaces of the Domestic and the International

This paper can properly be understood as a conversation. As authors, we come to this paper from different backgrounds, and seek to bring different approaches to the question of Indigeneity and how "health" may be properly constructed around that concept. In particular we are trying to understand the complicated space between the domestic and the international[1] to explore different understandings of how Indigenous peoples might practice good health, and how the health of Indigenous families, communities and nations might be measured. We do this from the positions as Indigenous and non-Indigenous people. This conversation—an act of storytelling—practices

our distinct jurisprudences and lawful relations with and to each other; and the international and domestic and the Indigenous international.

Meeting places of law, through conversation in particular, operate between individual people as actors of particular jurisprudence. One meeting place for the exchange of jurisprudence and the exercising of our multiple jurisdictions is through conversations as scholars. McMillan (2014: 118) defines jurisdiction as "an outward expression of the internal structure of a particular existence." He writes that in order to "understand a jurisdictional boundary or meeting point there must be a recognition of the structured existences of the other to observe (and respect) its jurisdiction" (McMillan 2014: 118). McMillan draws on the work of Shaunnagh Dorsett and Shaun McVeigh, who "assert that jurisdiction or 'speaking the law' is an activity [...] that must be practiced to be maintained" (McMillan 2014: 118; see Dorsett & McVeigh 2012). Indeed, "jurisdictional thinking may allow for a better explanation for how our lives, our existences, (through our laws) are structured" (McMillan 2014: 118). McMillan also points out that for Indigenous legal scholars and practitioners Christine Black (2011)[2] and John Borrows (2002),[3] the practice of jurisprudence through storytelling "is not new or novel [...] it is as old as our societies themselves" (McMillan 2014: 118). To begin this conversation, it is important that we first set out our individual stories, to "place" ourselves in our dialogue.

Faye: The Wiradjuri ways of knowing and being, *Yindymarra*, which *means* to show patience, respect and honour, and to be courteous has guided me through my upbringing in Trangie in the Central West of New South Wales—a little town on Wiradjuri country. *Yindymarra* has also guided me through my studies to become a pharmacist (the first Indigenous Australian to become a registered and practicing pharmacist) and post-graduate and doctoral studies in Indigenous health and its intersection with women leadership and nation-building. Coming into conversation with Sophie and Mark through their understanding of law allows me to practice my own understandings of law and jurisdiction as a Wiradjuri woman.

Sophie: Growing up as the grandchild of Polish people displaced by war, I was attracted to the hope of the international from an early age. I saw international law as being able to offer redress for wrongs. My current research is positioned in the field of critical approaches to international law, and my continued belief in the possibilities of international law is now present in my view that international law must transform into a stronger system than it is presently. In this conversation, I am grounded in my appreciation of how international law might operate as a tool for peoples to use to pursue claims to justice—which includes the many dimensions of health. Coming in to conversation with Mark and Faye allows me to better understand these

justice claims of Indigenous peoples and their resurgent nation-building processes, as well as understand more fully how European international law is best understood as only one version of international law, in encounter with Indigenous international laws. I therefore better appreciate the limits and fallibilities of the type of law I practice, and the discipline of which I am a member.

Mark: As a Wiradjuri man growing up "on Country"[4] in the west of New South Wales (a state of Australia) with a particular knowledge of the Wiradjuri (Indigenous), the international, and the domestic, storytelling and engaging with other scholars (like Sophie and Faye) is the meeting point that Christine Black (2011) and John Borrows (2002) refer to. I conceive of the Wiradjuri jurisdiction and jurisprudence as that of an atom. My nucleus is my Wiradjuri jurisdiction and jurisprudence—they hold the nucleus together. It is my ontology and my ontological connection to my country. The domestic and international jurisdictions are the electrons that orbit the nucleus. All three are needed to make up the atom—but there is a nucleus as the core. My Wiradjuri knowing is my core. Being in conversation with Faye and Sophie allows an exploration of the limits of experiences and understanding of the Indigenous, international and domestic, so that health in all its complicated forms for Indigenous peoples can be understood and practiced.

In this paper, we are engaged in a dialogue that rests upon different approaches to and experiences of international law. We are able to interrogate the hope of international law—and its failings—from different perspectives, in order to determine whether and how it can be of assistance to Indigenous peoples.

Retelling the Story of the Rights to Health and Self-Determination

The right to health was originally set out in the 1940s: first in the 1946 preamble of the World Health Organization (WHO 1946) and then in the 1948 Universal Declaration of Human Rights (UDHR 1946), article 25. It was with the International Covenant on Economic, Social and Cultural Rights (ICESCR 1966) that the right to health was first stipulated in treaty form. Article 12 of ICESCR states that the "States parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health" (ICESCR 1966). The right to health has been set out in a number of other international and regional human rights instruments.[5] The right to health has also been proclaimed by the Commission on Human Rights, and in the Vienna Declaration and Programme of Action of 1993. ICESCR is understood as part of the "second

generation" of human rights (see Macklem 2015). The obligation on states to protect and promote economic, social and cultural rights made ICESCR unpalatable to many Western nations—including the "CANZUS" block of Anglo-settler states (Canada, Australia, New Zealand and the United States of America), that would later voice concerns over the UNDRIP.

The right to health has been generally viewed as a right that attaches to individuals. The right to health articulated in the ICESCR is an individual one: health is something that people enjoy (or lack) as separate entities, and not as communities. This is different for Indigenous peoples, where health is experienced collectively as well as individually. While the ICESCR did not articulate this collective dimension of health, General Comment 14 on the Right to Health—which set out the normative underpinnings of this right under the ICESCR—acknowledged that Indigenous peoples have a particular understanding of, and experience of, health. It particularly noted that in Indigenous communities, "the health of the individual is often linked to the health of the society as a whole and has a collective dimension" (CESCR 2000).

This understanding of collective and holistic health of Indigenous peoples, as well as Indigenous individuals, was expanded in the UNDRIP. The right to health articulated under UNDRIP is important for two main reasons. First, it explicitly acknowledges the collective aspect of health and wellbeing. Second, it also acknowledges the intersections between governance rights and health rights, both of which are collective rights. The history of colonisation which has led to poor health outcomes, and the potential for collective health and wellbeing that may come of greater (collective) self-governance, are both parts of the collective Indigenous experience of health—and are both highlighted in the UNDRIP framework. The adoption of UNDRIP, as a moment in the "third generation" of human rights, allows us to examine how these collective rights to health and governance work in tandem. In operationalizing the rights articulated in UNDRIP, Indigenous peoples may be able to better realise justice for their Nations. These are the aspects of UNDRIP which need to be highlighted in a retelling of the story of the right to health under UNDRIP.

In the UNDRIP framework the right to health is not only an economic, social and cultural right: it is also a right that attaches to Indigeneity as a collective experience (McMillan & Rigney 2016). As Indigenous nations, the rebuilding and strengthening of our political and cultural institutions cannot be theorized and practiced without a proper interrogation how colonisation has impacted our ongoing physical, social and emotional well-being.

The UNDRIP is properly understood as a collective action of various communities of Indigenous peoples, and it provides a framework for under-

standing the intersections of our colonisation and our well-being. Through the Working Group on Indigenous Populations, established to draft and advance the Declaration, it became apparent that there was a

> universality to the narrative of oppression and racial discrimination described by Indigenous peoples as a consequence of colonialism [and] a commonality to the ways colonisers had dispossessed Indigenous peoples of their lands. (Davis 2012: 20)

The implications for health were clear (Cobo 1983: 21). Colonisation, and its continuing legacy of oppression, discrimination, and trauma, has resulted in poor Indigenous health outcomes. Understanding how Indigenous experiences of colonisation have affected Indigenous health is important for the leaders of Indigenous nations—because it brings a better appreciation of the urgent need to restore the social and emotional wellbeing of Indigenous citizens within our nations, *as well as a focus on the health of our Nations themselves.*

UNDRIP also provided a particular moment for understanding the relationship between self-determination and governance, and health. The collective rights to self-determination and self-governance can be linked to a right to health at both collective and individual levels. Self-determination is the "overarching norm" of the UNDRIP, and it is "from the right to self-determination that the corpus of Indigenous rights can be realised" (Davis 2013: 11). Self-determination is also the first right outlined in both the International Covenant on Civil and Political Rights (ICCPR) and ICESCR, and is therefore both a civil and political right, and an economic, social and cultural right (ICCPR 1966: article 1; ICESCR 1966: article 1). Operationalizing this right in the governance and health spheres, and understanding how health and governance are linked through self-determination, is important for understanding the relationship between governance, culture, and health outcomes.

We can see the connections between collective rights to health, and collective rights to governance, when we examine the particular rights to health under the UNDRIP. The right to health is protected under articles 23 and 24 of the UNDRIP. Article 23 states that:

> Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions. (UNDRIP 2007: article 23)

In this way, the links between governance, self-determination, development and health are acknowledged in this provision. Megan Davis has noted that community control over health is a way of operationalizing the right to self-determination (Davis 2012). As Davis argues, the community sector, such as health providers "deal with the bread and butter of self-determination—choices people make about their lives each and every day" (Davis 2012: 13). For Davis, "the health community control sector is implementing the UNDRIP in terms of leading the way on the right to self-determination—what it looks like in practice" (Davis 2012: 13). In this way, the right to health is a way of "doing" self-determination. In addition, self-determination over healthcare—through community control over health—is recognition of the need to protect and promote health and wellbeing in a collective way. Yet self-governance beyond the specific health programmes may also have consequences for health outcomes, and we explore this below.

Self-determination can rightly be considered a cultural determinant of health. As Ngaire Brown notes,

> cultural determinants of health originate from and promote a strength based perspective, acknowledging that stronger connections to culture and country build stronger individual and collective identities, a sense of self-esteem, resilience, and improved outcomes across the other determinants of health including education, economic stability and community safety. (Brown 2013)

Other cultural determinants of health include freedom from discrimination; the ability to enjoy individual and collective rights; and freedom from assimilation and destruction of culture (Brown 2013). Brown also lists other cultural determinants of health, such as protection from removal/relocation; connection to, custodianship, and utilisation of country and traditional lands; reclamation, revitalization, preservation and promotion of language and cultural practices; protection and promotion of Traditional Knowledge and Indigenous Intellectual Property; and understanding of lore, law and traditional roles and responsibilities (Brown 2013). There is an understanding of the link between connection to Country, and positive health outcomes for Indigenous peoples (Kingsley *et al.* 2013: 678). That these are both cultural determinants of health, and also rights of Indigenous peoples set out under the UNDRIP, demonstrates the connection between self-determination, the operationalization of Indigenous rights, and health outcomes.

The connection between self-governance and health is also seen in article 24 of UNDRIP, which asserts that Indigenous peoples have the right to their traditional medicine and to maintain their health practices. Indi-

genous individuals also have the right to access all social and health services, free from discrimination (UNDRIP 2007: article 24). Article 24 also states that:

> Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right. (UNDRIP 2007: article 24)

This is crucial, as the Declaration legitimates and affirms the "value of protecting indigenous peoples' ways of life and cultures per se" (Williams 1990: 687). The right to equality in healthcare, and the right to freedom from discrimination that is noted in this provision are particularly important. As the Martinez Cobo report noted, discrimination does characterize Indigenous experiences of healthcare provision (Cobo 1983).

Thus, community control over the provision of health services is simultaneously a way of operationalizing self-determination; a way of linking the right to self-determination to the right to health; and a way of understanding that self-determination in the provision of health services will result in positive outcomes both for governance and health. There are health benefits from promoting Indigenous ways of knowing and doing healthcare, and wellness. It is, however, important to expand the area of enquiry and examine how self-governance and nation-building may affect health.

How Can this Retelling Be Used by Indigenous Leaders in their Efforts in Formal Nation-Building?

Indigenous nation-building—as an academic exercise—is a relatively recent phenomenon largely due to the work of the Harvard Project on American Indian Economic Development (HPAIED 1980s).[6] The questions that Indigenous nation-building as an academic exercise offer to the practice of Indigenous nation-building are exciting. One of the critical frames for Indigenous nation-building in Australia is its relationship to the UNDRIP. The establishment of understanding the rights to health for Indigenous peoples and nations within the framework of Indigenous nation-building is crucial to understanding the dimensions of the right expressed in the UNDRIP. In order to understand how UNDRIP's right to health can be operationalized in Indigenous nation-building, it is first important to ground Indigenous nation-building in the Australian academic space and then position that against the practice of Indigenous nation-building by nations.

A growing number of Indigenous peoples are engaged in nation-building: they are "expressing greater desires for self-governance and creating

legitimate and effective governing institutions" (ARC DP1092654 2009). There is a suite of research projects that focus on Indigenous nation-building in Australia. Collaborating universities[7] and three Indigenous nations (Wiradjuri, Ngarrindjeri and Gunditjmara) are starting to develop materials that seek turn nation-building theory into practice for the unique Australian applications.

One of the initial developments in Indigenous nation-building that have occurred in the curriculum space has been within the Wiradjuri nation project. This project has involved embedding Indigenous nation-building into a health and leadership framework within existing course offerings at Charles Sturt University, a large multi-campus public university in Australia. The connections between health and governance feature prominently in the courses that one of the authors (Faye) has direct teaching and learning responsibility for. The starting point has been the Martinez Cobo report that demands that Indigenous peoples have special health needs and that those needs are a reflection on their physical and socio-cultural environment (Cobo 1983). These encompass not just physical health but the mental health and social and emotional wellbeing of Indigenous peoples. The retelling of these rights can be used by Indigenous leaders and nation builders in formal (direct) and informal (indirect) nation-building activities.

The following example is drawn from the delivery of a specific nation-building subject in the Graduate Certificate in Wiradjuri Language, Culture and Heritage Program (WLCH) "Rebuilding Australia's Indigenous Nations" at Charles Sturt University (CSU). The programme seeks to "build students' capacity to become community spirited leaders who guide the empowerment and development of Indigenous nations" (CSU IKC401 2015). It explores concepts of nation-building, how nation-building informs collective health, and the centrality of culture as a unifying force. The WLCH program is a non-restricted program that seeks to engage all members within the community to understand and contribute to the nation-building activities within the communities in which they reside. The students undertaking the WLCH are empowered to use Wiradjuri language, noting that the UNDRIP identifies the access to and the ability to speak language.

Another initiative at the same university has involved integrating Indigenous nation-building concepts into a restricted entry program of the Bachelor of Health Science (Mental Health) degree known as the Djirruwang Program (CSU MHP302 2015). The program restricts entry to the Baccalaureate Degree to people identifying as Aboriginal and/or Torres Strait Islander and comprises a diverse cohort of students that represent a number of different nations across Australia. The nation-building component involves engaging small focus groups, supplemented by material from the

University of Technology Sydney (UTS): Jumbunna—Indigenous House of Learning, and the Native Nations Institute for Leadership, Management and Policy at the University of Arizona. Consent has been given from these institutions to utilise material from "Changing the Conversation. A Guide for Indigenous Community Reflections on Nation Building." The research aim is to utilise a strengths-based approach to nation-building to empower individuals to take this knowledge back to their communities and embed the practical elements of Rebuilding Australian Indigenous Nations (RAIN) into their everyday structures.

Third year students within the Djirruwang program were introduced to nation-building concepts and ideas within a paper focused on professional issues. They discussed ways in which individuals could contribute to the service delivery of mental health services as citizens within their own nation or working within another Indigenous nation. This exploration was undertaken in a supportive environment with students sharing their lived experiences and identifying those areas that could be considered to be nation-building activities. This activity was supplemented through the use of case studies that generated group discussion and self-reflection. Students were encouraged to complete an evaluation of the session around the subject delivered on the day and all 16 responded. We asked to identify the session highlights, their responses included:

- Nation-building was the highlight for me—it has given me the tools to re-connect with my community;
- Understanding what it takes to build a nation;
- Self-awareness activities (what I do for my nation);
- Hearing from the group—easier to learn when we know that it is already happening (we just didn't call it nation-building);
- The variety and quality of the information.

This feedback shows the varied ways in which Indigenous students can incorporate concepts of nation-building in their professional carriage and within their own nations, irrespective of whether they live on or off Country.

Conclusion

The passage of UNDRIP has provided us with a framework to understand the rights to health and to self-determination as collective, interdependent, and indivisible rights. For Indigenous peoples, they are rights that are experienced as individuals, peoples, and Nations. UNDRIP's acknowledgement of the effect of the colonial experiences on health outcomes means that we

can appreciate the need for healthy Nations in order to ensure the health of our peoples, and vice-versa. The health of peoples and the health of Nations is thus symbiotic. We can use this retelling of the right to health under UNDRIP as a starting place for Indigenous Nations leaders to pursue an agenda of healthy nations: Nations that utilise self-determination as a cultural determinant of health. As we have demonstrated, linking health and nation-building has been done successfully in university education, with students demonstrating a strong understanding of how health and nations are inter-dependent. The retelling of the story of the right to health permits a holistic approach to healthcare and nation-building, as collective rights that will lead to collective positive outcomes.

NOTES

[1] By "the domestic" and "the international," we mean the orders of both law and politics, which exist at the level of the nation-state and of the international. "The domestic"' is related to the nation-state. "The international" is related to the interactions between nation-states and to organisations such as the United Nations, and includes international law. See also McMillan & Rigney (2016).

[2] Dr Christine Black is a Kombumerri and Munaljahlai woman; http://www.griffith.edu.au/environment-planning-architecture/griffith-centre-coastal-management/staff/christine-black; access date 14 May 2015.

[3] Professor John Borrows is Anishinabek (also called Ojibway or Chippewa). He is a member of the Chippewas of the Nawash First Nation from Georgian Bay, in the Lake Huron area of Ontario, Canada; http://www.law.umn.edu/facultyprofiles/borrowsj.html; access date 14 May 2015.

[4] *Country* for the context used in this paper: "A term used by Aboriginal people to refer to the land to which they belong and their place of Dreaming. Aboriginal language usage of the word country is much broader than standard English" (Australian Museum, *Glossary of Indigenous Australia Terms*; http://australianmuseum.net.au/glossary-indigenous-australia-terms; access date 5 February 2017). Country is much more than the land; it is also the place of our jurisdiction and jurisprudence. There has always been governance existing of the land with the peoples that are connected to it. European conceptions of governance exist in tandem with the Indigenous nations that exist over the same territory.

[5] The right to health is recognised, *inter alia*, in the International Convention on the Elimination of All Forms of Racial Discrimination 1965, article 5 (e) (iv); the Convention on the Elimination of All Forms of Discrimination against Women 1979, articles 11.1 (f) and 12; the Convention on the Rights of the Child 1989, article 24. Regional human rights instruments which recognize the right to health include the European Social Charter 1961, article 11; the African Charter on Human and Peoples' Rights 1981, article 16; and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights 1988, article 10.

[6] HPAIED, Harvard Project on American Indian Economic Development. Foundational work began with the Harvard Project on American Indian Economic Development in

the 1980s. From that specific project emerged, in parallel, The Native Nations Institute for Leadership, Management, and Policy (NNI). Both projects are currently housed at The University of Arizona's Udall Center for Studies in Public Policy, and have formal places within the current Australian collaborations on Indigenous nation-building (see http://nni.arizona.edu/; http://hpaied.org/; http://government.unimelb.edu.au/research/research-theme-governance-and-performance/research-project-indigenous-nation-building; access date 8 March 2017)."

[7] The participating universities are the University of Technology, Sydney (Jumbunna—Indigenous House of Learning), Australian National University, Flinders University, RMIT University, Charles Sturt University, University of Arizona and the University of Melbourne (Melbourne Law School and Melbourne School of Government). The initial grant awarded from The Australia Research Council Discovery project was entitled "Changing the Conversation—Reclaiming Indigenous Government." This project has been supplemented by an Australia Research Council Linkage grant, "Indigenous nationhood in the absence of recognition. Self-governance insights and strategies from three Aboriginal communities," and the Melbourne School of Government Research Cluster grant, "Indigenous Nation Building. Theory; Practice and its emergence in Australia's public policy discourse."

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